

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

CHARLES JOSEPH MAKI,

Petitioner,

vs.

ROBERT LEGRAND, *et al.*,

Respondents.

3:12-cv-00201-LRH-VPC

ORDER

This closed habeas matter under 28 U.S.C. § 2254 comes before the Court on petitioner's motion (#17) to reconsider the order and judgment of dismissal and motion (#18) to reconsider the denial of a certificate of appealability. The motions were both mailed and filed within the time period for seeking relief under Rule 59 of the Federal Rules of Civil Procedure, but the motions initially were not signed by petitioner.

The first motion (#17) remains unsigned. The Court informed petitioner that a signature of a certificate of service did not constitute a signature of the motion itself. He again presented the motion without a signature on the motion rather than the certificate of service.

Petitioner in all events has not established a basis either for reconsideration of the dismissal or of the denial of a certificate of appealability.

Petitioner Charles Joseph Maki sought to challenge his 1994 Nevada state conviction, pursuant to a jury verdict, of three counts of sexual assault on a child under the age of 14 years and five counts of lewdness with a child under the age of 14 years. The present federal petition was filed over a decade after the federal limitation period expired, absent additional tolling or delayed accrual. The present petition further was filed more than three years and seven months after an August 18, 2008, order

1 denying his post-judgment motion seeking to overturn the July 5, 2006, final judgment dismissing his
2 prior federal petition without prejudice in No. 2:01-cv-00268-RLH-PAL.

3 The prior federal action was dismissed in 2006 after petitioner failed to file a written notice of
4 his change of address and court mail was returned. Petitioner contends, first, that the Court overlooked
5 that personnel at the prison law library could look up where he might be on the computer at any time.
6 Petitioner apparently is responding to a point expressly made in passing in the following footnote:

7 The Court additionally notes in passing that embedding a new
8 address in a filing does not constitute a written notice of a litigant's new
9 address and does not establish that the Court is aware of the new address.
10 Local Rule LSR 2-2 requires that a litigant "immediately file with the
11 Court written notification of any change of address." This requires that
12 the litigant in fact send a written notice of the change of address, not
13 merely *sub silentio* embed an address in filings. See ## 12 & 13 (recent
14 notices by petitioner of change of address). Otherwise, the local rule
15 would read only that a litigant "must include his most recent address on
16 all filings." The purpose of such a notice is to avoid what happened
17 here, by providing the Clerk with a clear notice of the plaintiff's change
18 of address. If plaintiff instead had complied with the local rule, he
19 would not have had to rely upon the Clerk independently observing that
20 he used a different address on a recent filing and/or a prison law library
21 tracking him down in the state-wide prison system and forwarding his
22 mail. In both instances, neither the Clerk nor the prison law library can
23 independently determine how long an inmate will be at a particular
24 institutional address. The purpose of a clear notice of change of address
25 is for the plaintiff to clearly indicate to the Clerk where his mail then
26 should be sent, to get the mail sent to the proper place in the first
27 instance. When petitioner failed to comply with the local rule, he
28 created the very situation that the rule is intended to avoid and that led
to the dismissal of the prior petition.

19 #14, at 9 n.10.

20 Petitioner overlooks the basis for the Court's rejection of his corresponding tolling argument
21 with regard to the untimeliness of *this* action:

22 *Third*, petitioner contends that he was subjected to an
23 unconstitutional State-created impediment with regard to the handling
24 of his mail from this Court in connection with the dismissal of No. 2:01-
25 cv-00268. He maintains that he was transported from Lovelock
26 Correctional Center ("Lovelock") to Southern Desert Correctional
Center ("Southern Desert") in early 2006, that he listed a Southern
Desert address on a filing prior to the dismissal, and that the Lovelock
prison law library failed to forward his mail to Southern Desert as
allegedly required by policy.

27 Whatever correctional authorities allegedly failed to do in 2006
28 did not prevent petitioner from filing a petition at any time prior to the
expiration of the federal limitation period otherwise nearly five years

1 earlier on October 30, 2001. § 2244(d)(1)(B) does not operate to revive
 2 a long-since expired limitation period where there was no impediment
 3 to filing or other basis for tolling or delayed accrual prior to the
 expiration of the limitation period. Petitioner's argument simply is a *non*
sequitur.

4 Moreover, even if the Court were through some tortured logic to
 5 regard the events in 2006 as a basis for delayed accrual nearly five years
 6 after the limitation period already had expired on October 30, 2001,
 petitioner quite clearly knew of the prior dismissal in early 2008. He did
 7 not file the present federal petition until approximately *four years* later,
 and over *three years* after the denial of his motion for relief from
 judgment in that case. Petitioner presents no viable basis for tolling
 8 and/or delayed accrual during those multiple intervening years. None of
 the well-after-the-fact circumstances from 2006 that petitioner relies
 upon prevented him from filing the federal petition that he filed in 2012
 9 instead in, *e.g.*, 2011, 2010, or 2009.

10 Petitioner in essence is seeking to relitigate in this action the
 dismissal of his first federal petition and the denial therein of his motion
 11 for relief from judgment. Petitioner's remedy, if any, with regard to the
 dismissal of No. 2:01-cv-00268 was via requests for relief filed in that
 12 proceeding and/or via an appeal, the latter of which petitioner did not
 pursue. Nothing that occurred in the prior action provides a basis for
 13 rendering timely a second federal petition filed over a decade after the
 expiration otherwise of the federal limitation period, nearly six years
 14 after the prior dismissal, approximately four years after petitioner
 unquestionably learned of the prior dismissal, and over three years after
 the denial of a motion for relief from judgment in that case. The
 15 dismissal in No. 2:01-cv-00268 is a long since conclusively resolved
 matter and does not provide a viable basis for rendering the present
 16 petition timely multiple years after the fact. Again, any *arguendo* error
 or State-created constitutional deprivation in connection with the
 17 dismissal of the prior action has not prevented petitioner from filing a
 federal petition in the *years* that have intervened.

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 19 #14, at 8-9 (with note 10 at the end of the passage already having been quoted).

20 Petitioner cannot relitigate the dismissal of No. 2:01-cv-00268 by filing a new petition.

21 Petitioner suggests, second, that he should not be denied relief because he is not as intelligent
 22 as an attorney, and he maintains that he was diligent in all of his filings in the prior action up until the
 23 time that he did not receive his mail after not updating his address.

24 Petitioner is responding to the following footnote, also clearly made in passing:

25 Of course, if Maki had not balked at the representation provided
 26 by the Federal Public Defender, he would have had counsel ultimately
 with such "fingertip" access. As the Court found then, "[a]t bottom, no
 27 competent attorney appointed will proceed as petitioner wishes for
 counsel to proceed." Petitioner was the architect of his own situation.

28 #14, at 10 n.11.

Petitioner again overlooks the basis for the Court's rejection of his corresponding tolling argument with regard to the untimeliness of *this* action:

Fifth, petitioner contends that he has been denied access to the courts as an impediment for purposes of § 2244(d)(1)(B) because: (a) he has no computer access to the federal court electronic docketing system, *i.e.*, the Case Management/Electronic Case Files (CM/ECF) system; and (b) the Clerk of this Court charges litigants for copies of a docket sheet after one has been provided previously. He maintains, *inter alia*, that "[t]he Attorney General's Office and the Federal Public Defender's Office would have access at their fingertips, but not the petitioner, whom is at somewhat of a disadvantage."

Once again, there are several fundamental flaws with this argument. First, the federal electronic docketing system and the federal clerk's fee requirements do not constitute State action for purposes of § 2244(d)(1)(B). Second, CM/ECF did not come on stream in this Court until approximately November 2005, four years after the limitation period expired on October 30, 2001. Third, neither CM/ECF nor the Clerk's fee requirements had anything to do with the dismissal of the prior action, which may not be relitigated in this action in any event. That action was dismissed because petitioner failed to file a written notice of his change of address, not because of his inability to check the record or to obtain a copy of a docket sheet. Petitioner was not proceeding *in forma pauperis*, and he thus had to pay for copies just like any other litigant. Fourth, neither CM/ECF nor the Clerk's fee requirements "altogether prevented [petitioner] from presenting his claims in *any* form, to *any* court" at any point, much less continuously from 2006 through the filing date of the present petition in 2012. *Cf. Ramirez, supra*. Prisoners have been filing and pursuing habeas petitions without access to an electronic docketing system literally for centuries. *See, e.g., Darnel's Case*, 3 How. St. Tr. 1 (K.B.1627).

#14, at 10 (with footnote 11 at the end of the first paragraph already having been quoted).

Petitioner cannot relitigate the dismissal of No. 2:01-cv-00268 by filing a new petition.

With regard to *this* action, petitioner's *pro se* status – whether self-inflicted or not – and lack of legal sophistication does not provide a basis for tolling. *E.g., Rasberry v. Garcia*, 448 F.3d 1150, 1154 (9th Cir. 2006).

Petitioner next refers to the legal resources available at Lovelock in 2006. He maintains that while a paging system for law library access may not be an unconstitutional impediment, the absence of trained legal assistance was, given his professed limited intelligence. He urges that the Court did not take into consideration that the general population at Lovelock already was using a paging system at the time of the prior dismissal.

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Petitioner again overlooks the complete basis for the Court's rejection of his corresponding tolling argument with regard to the untimeliness of *this* action:

Fourth, petitioner contends that the use of a "paging system" for prison law library access at Lovelock, which does not involve direct physical access to the library, denied him access to the courts and constituted an impediment for purposes of § 2244(d)(1)(B). He relies upon *Koerschner v. Warden*, 508 F.Supp.2d 849, 851 (D.Nev. 2007), in support of this argument.

There are several fundamental flaws with this argument. First, the physical satellite library in the sex-offender protective segregation unit at Lovelock was not closed during the conversion to a paging system until late 2006, five years after the limitation period expired on October 30, 2001. *See Koerschner*, 508 F.Supp.2d at 851. Second, the adoption of the paging system at Lovelock further had nothing to do with the dismissal of the prior action, which may not be relitigated in this action in any event, and appears to have been adopted subsequent to that dismissal. **Third, the use of a paging system at Lovelock has not "altogether prevented [petitioner] from presenting his claims in any form, to any court" at any point, much less continuously from 2006 through the filing date of the present petition in 2012. Cf. Ramirez, supra. The Court takes judicial notice that Nevada state inmates at institutions with paging system law library access, including Lovelock, have filed hundreds if not thousands of petitions, complaints, and other filings from 2006 continuously through to the present day.** Fourth, Judge Reed explicitly declined to make a constitutional holding in *Koerschner*, and his comments were directed to circumstances weighing in favor of appointment of federal habeas counsel. *See* 508 F.Supp.2d at 861. Fifth, this Court further has rejected the proposition that the mere fact that a prison uses a paging system for law library access in and of itself provides a basis for equitable tolling of the federal limitation period. *See, e.g., Felix v. McDaniel*, 2012 WL 666742, No. 3:09-cv-00483-LRH-WGC, at *5-*9 (D. Nev., Feb. 29, 2012). *A fortiori*, use of a paging system in and of itself does not constitute an unconstitutional impediment giving rise to a basis for delayed accrual under § 2244(d)(1)(B).

#14, at 9-10 (bold emphasis added).

Petitioner cannot relitigate the dismissal of No. 2:01-cv-00268 by filing a new petition.

With regard to *this* action, the fact that a prison uses a paging system for law library access while also not providing active legal assistance to inmates does not itself give rise to a basis for tolling. *Felix, supra*. Petitioner's lay status and lack of legal sophistication – again – does not provide a basis for tolling. *E.g., Rasberry, supra*. Regardless of when the paging system was implemented for the general population at Lovelock, it does not provide a basis for tolling for this action under § 2244(d)(1)(B). It did not do so in 2006, and it did not do so in 2007, 2008, 2009, 2010, 2011 or 2012. *Ramirez, supra*.

1 In the event that the Court has not made the point adequately previously, it states it again.
2 Petitioner cannot relitigate the dismissal of No. 2:01-cv-00268 by filing a new petition.

3 Petitioner's motion for reconsideration of the dismissal order therefore will be denied.

4 Petitioner's motion for reconsideration of the denial of a certificate of appealability (COA) also
5 will be denied.

6 Petitioner designates two claims as to which he seeks a COA. See #17, at 3. He seeks a COA
7 as to a claim of an alleged *Brady* violation and a claim of a denial of a right to testify.

8 The petition was denied as untimely, not on the merits. As to claims rejected on procedural
9 grounds, the petitioner must show that: (1) jurists of reason would find it debatable whether the petition
10 stated a valid claim of a denial of a constitutional right; *and* (2) jurists of reason would find it debatable
11 whether the district court was correct in its procedural ruling. *Slack v. McDaniel*, 529 U.S. 473, 484.
12 While both showings must be made to obtain a COA, "a court may find that it can dispose of the
13 application in a fair and prompt manner if it proceeds first to resolve the issue whose answer is more
14 apparent from the record and arguments." 529 U.S. at 485. Where a plain procedural bar is properly
15 invoked, an appeal is not warranted. 529 U.S. at 484.

16 Jurists of reason would not find debatable whether the Court was correct in dismissing the
17 present petition, which was filed over a decade after the limitation period had expired, as untimely. As
18 the Court observed previously in this regard:

19 Reasonable jurists would not find debatable or wrong the
20 district court's dismissal of the petition as untimely. The federal
21 limitation period, absent tolling or other delayed accrual, expired on
22 October 30, 2001. Petitioner in fact filed a federal petition within that
23 time period, but the prior action was dismissed in 2006 after petitioner
24 failed to file a written notice of his change of address. The Court denied
25 post-judgment relief in that prior action in 2008, and petitioner did not
26 appeal. He did not constructively file the present action until years later,
27 on or about April 9, 2012. Petitioner's efforts to establish a basis for
28 delayed accrual under 28 U.S.C. § 2244(d)(1)(B) based upon a State-
created impediment to filing are fundamentally flawed. On the one
hand, petitioner relies upon already-known alleged trial errors that
clearly did not constitute an impediment thereafter to the filing of even
the underlying claims, much less to the filing of a timely federal petition.
On the other hand, petitioner in essence seeks to relitigate the dismissal
of the prior federal action as an alleged "impediment" to filing under
§ 2244(d)(1)(B). Even if a court were to indulge petitioner's tortured
logic in this regard, the circumstances surrounding the 2006 dismissal

1 clearly did not constitute an impediment continuously for several *years*
2 thereafter, up to within one year of the April 9, 2012, constructive filing
3 date of the present petition. Petitioner's arguments seeking to overcome
the federal time bar have no conceivable merit as a basis for rendering
the present petition timely.

4 #14, at 12.

5 Petitioner again urges that the withholding of favorable evidence in violation of *Brady*
6 constitutes an example of an unconstitutional impediment that provides a basis for statutory tolling
7 under § 2244(d)(1)(B).

8 Petitioner's argument again is fundamentally flawed:

9 *First*, petitioner contends that he was subjected to an
10 unconstitutional State-created impediment when the prosecution
11 allegedly failed to turn over favorable photographic forensic evidence
prior to trial that was not revealed until the testimony of the sexual
12 assault examination nurse at the April 1994 trial, allegedly in violation
of *Brady v. Maryland*, 373 U.S. 83 (1963).

13 Petitioner has not presented a viable basis for delayed accrual
under § 2244(d)(1)(B) on the basis of an alleged *Brady* violation
14 premised upon the State not disclosing favorable evidence until the trial.
§ 2244(d)(1)(B) requires not merely a showing of a violation of the
15 Constitution or laws of the United States in isolation. Rather,
§ 2244(d)(1)(B) instead requires a showing of such a violation that
16 creates an "impediment to the filing of an application," i.e., a federal
habeas petition. Under established Ninth Circuit law, a petitioner
17 seeking to demonstrate delayed accrual on this basis must demonstrate
that the alleged impediment "altogether prevented him from presenting
18 his claims in *any* form, to *any* court." *Ramirez v. Yates*, 571 F.3d 993,
1000–1001 (9th Cir.2009)(emphasis in original). Nothing in the
19 occurrence of a *Brady* violation where disclosure allegedly was delayed
until trial prevented Maki from presenting his claims thereafter in any
20 form to any court. Indeed, Maki quite clearly filed both a state petition
and a federal petition notwithstanding the alleged prior occurrence of the
21 *Brady* violation. Indeed, petitioner presented the same underlying *Brady*
claim itself in both the state and federal petitions.[FN9] The alleged
22 occurrence of a *Brady* violation based upon a failure to disclose
favorable evidence until the 1994 trial quite clearly did not prevent Maki
23 from filing a federal habeas petition continuously for nearly two decades
thereafter, either logically or in actual fact.


24 [FN9] Compare No. 2:01-cv-00268-RLH-PAL, #26, Ex.
10, at electronic docketing page 34 (state Ground 3
25 supporting facts), and, *id.*, #6, at 7 (federal Ground 3),
26 with #11, at 3-7 (*Brady* allegations in show-cause
response).

27 #14, at 7.

28 All requests for relief on the motion accordingly will be denied.

1 IT THEREFORE IS ORDERED that petitioner's motion (#17) to reconsider the order and
2 judgment of dismissal and motion (#18) to reconsider the denial of a certificate of appealability are
3 DENIED.

4 DATED this 31st day of March, 2014.

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8 LARRY R. HICKS
9 UNITED STATES DISTRICT JUDGE
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